

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of
CEBRIDGE ACQUISITION, L.P.
For Assignment of Point to Point Microwave
Authorizations and Waiver of Section 101.701(c)
of the Commission's Rules
File No. 0002415753

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2006

Released: April 5, 2006

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address Cebridge Acquisition, L.P.'s (Cebridge) request for waiver of Section 101.701(c) of the Commission's Rules as part of Cebridge's application for assignment of the authorization of Cox Southwest Holdings, L.P.'s (Cox) common carrier fixed point-to-point microwave licenses for KLS33, KLS34, and KLU53 to Cebridge. For the reasons stated below, we grant Cebridge's request for a temporary waiver for a period of 180 days and otherwise deny Cebridge's request.

II. BACKGROUND

2. On October 31, 2005, TCA Cable Partners, a Delaware general partnership; Cox, a Texas limited partnership; Cox Communications Louisiana, L.L.C., a Delaware limited liability corporation; CoxCom, Inc., a Delaware corporation; Cox Telcom Partners, Inc., a Delaware corporation; and Cox Communications, Inc., a Delaware corporation, on the one hand (collectively "Assignors"), and Cebridge Acquisition Co. LLC (CAC), a Delaware limited liability company on the other hand, entered into an Asset Purchase Agreement. Pursuant to the Asset Purchase Agreement, various Cox affiliates will

1 See Public Interest Consideration and Waiver Request (Waiver Request) accompanying Application for Assignment of Authorization, File No. 0002415753 (filed Dec. 19, 2005). See also Public Notice, Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of License Applications, and De Facto Transfer Lease Applications Accepted for Filing, Report No. 2353 (rel. Dec. 28, 2005).

2 47 C.F.R. § 101.701(c).

3 Waiver Request at 1. Prior to closing of the transactions contemplated by the asset purchase agreement, CAC will assign certain of its rights under the agreement to Cebridge. Id. Cebridge states that this does not involve the actual assignment of any licenses to CAC, which will be assigned directly to Cebridge. Letter of Robert L. James, Esq. to Marlene Dortch (dated Feb. 16, 2006).

4 These affiliates are Cox Communications, Inc.; CoxCom, Inc.; Cox California Telcom, L.L.C.; Cox Communications Louisiana LLC; Cox Louisiana Telcom, L.L.C.; Cox Missouri Telcom, L.L.C.; Cox North Carolina Telcom, L.L.C.; Cox Oklahoma Telcom, L.L.C.; Cox Southwest Holdings, L.P.; Cox Texas Telcom, L.P.;

assign to Cebridge cable television systems and certain related technical and operational facilities serving approximately 940,000 subscribers (hereinafter, “the Transaction”).<sup>5</sup> The Transaction involves numerous FCC authorizations, including the three common carrier point-to-point microwave licenses that are the subject of the above referenced application.<sup>6</sup> As a result of the Transaction, the cable television systems receiving service from the microwave licenses at issue will be owned by Cebridge or one of its affiliated companies.<sup>7</sup> Section 101.701(c) of the Commission’s Rules requires as a condition of eligibility that at least fifty percent of the customers on a common carrier microwave system used primarily to relay broadcast television signals not be affiliated with the licensee, and that the usage by such customers constitute at least fifty percent of the licensee’s service (the 50/50 affiliation requirement).<sup>8</sup> Because Cebridge would be using the three common carrier microwave licenses to relay broadcast television signals to cable television systems owned by Cebridge or an affiliated company,<sup>9</sup> Cebridge seeks a waiver of this rule.

3. Cebridge argues that the Commission’s primary purpose in adopting the 50/50 affiliation requirement was to ensure “that the development of common carriers serving the public should not be blocked or inhibited by the presence in the common carrier bands by persons serving principally their own businesses, who have other frequencies allocated for such activities.”<sup>10</sup> Cebridge argues that grant of its requested waiver would not compromise the Commission’s policy in any way.<sup>11</sup> Cebridge contends that since the rule was first adopted in 1965, fiber and satellite transmission facilities have substantially reduced the frequency congestion anticipated in these bands, allowing Commission staff to grant various applications containing requests for waiver of the rule, permitting the continued operation of existing facilities.<sup>12</sup> Furthermore, Cebridge states that only a limited number of existing stations and frequencies

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TCA Cable Partners; and TCA Communications, L.L.C. The assignor of the common carrier point to point microwave licenses in the instant case is Cox Southwest Holdings, L.P.

<sup>5</sup> *Id.*

<sup>6</sup> Other authorizations involved include 50 business radio licenses and 12 Cable Television Relay Service (CARS) licenses. Waiver Request at 1. The business radio license applications for assignment of authorization were consented to on December 23, 2005. Public Notice, Wireless telecommunications Bureau, Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications Action, Report No. 2354A (rel. Dec. 28, 2005). The CARS applications for assignment of authorization were granted on February 2, 2006. Public Notice, Cable Television Relay Service (CARS) Applications Re: Actions on Pending Applications, Report No. 4025 (rel. Feb. 8, 2006).

<sup>7</sup> Waiver Request at 2.

<sup>8</sup> 47 C.F.R. § 101.701(c).

<sup>9</sup> Cebridge notes that the facilities in question have been used for more than twenty years to relay television signals from the Dallas/Ft. Worth market to several small cable television systems in northern Texas and southern Oklahoma. Waiver Request at 1-2. KLS33 transmits from Isom Ranch, Texas to Paris, Texas. KLS34 transmits from Paris, Texas to Blossom, Clarkville, and Isom Ranch, Texas, and Hugo, Oklahoma. KLU53 transmits from Hugo, Oklahoma to Sharp’s Mountain and Idabel, Oklahoma.

<sup>10</sup> Waiver Request at 2, citing Amendment of Parts 2, 21, 74, and 91 of the Commission’s Rules and Regulations Relative to the Licensing of Microwave Radio Stations Used to Relay Television Signals to Community Antenna Television Systems, *First Report and Order and Further Notice of Proposed Rulemaking*, Docket No. 15586, 1 FCC 2d 897, 901 (1965) (*First R&O*).

<sup>11</sup> Waiver Request at 2.

<sup>12</sup> *Id.* at 2 n. 1. Cebridge, however, cites only to file numbers which Commission staff have been unable to locate, and provides no record of an actual decision document.

are involved in the instant case, located in a remote area where there is no frequency congestion and none is likely to develop.<sup>13</sup>

4. Cebridge further states that, in view of the length of the microwave paths involved, it is not possible readily to convert the system to the CARS band or to install fiber to replace the existing facilities.<sup>14</sup> In addition to the cost of new equipment, notes Cebridge, conversion to the CARS band would require re-engineering the entire route as well as the construction of additional transmit locations and towers.<sup>15</sup> Installing fiber over these distances, notes Cebridge, would involve many new easements, pole attachment and other fees, as well as the substantial cost of installing the fiber and related equipment.<sup>16</sup> This would be prohibitively expensive, Cebridge argues, particularly in view of the limited number and small universe of customers.<sup>17</sup> Cebridge emphasizes that its proposal involves no new frequency usage, but rather the continuation of existing microwave facilities that have been in place for many years, and that grant of the requested waiver will permit the status quo to continue so that the public can continue to receive the television signals carried.<sup>18</sup> Denial of the waiver on the other hand, Cebridge contends, would result in either a loss of services or substantially higher costs that would ultimately be passed through to Cebridge's subscribers.<sup>19</sup> Cebridge notes that this application is a relatively small but essential part of a much larger \$2.5 billion transaction, and argues that the public interest will be served by permitting Cebridge to maintain these existing microwave operations.<sup>20</sup>

5. Alternatively, Cebridge argues that without a permanent waiver, a waiver for the remainder of the license term<sup>21</sup> is warranted.<sup>22</sup> Cebridge states that the Commission previously granted a waiver of the 50/50 affiliation requirement to Universal Cable Communications (Universal) for the remainder of its three license terms for WML204, WML205, and WML206 (approximately five years), and contends that the facts of Cebridge's case warrant the same relief.<sup>23</sup> Cebridge contrasts its situation – seeking a waiver for existing stations and service -- with that of Universal's separate request for authorization to construct a new station, WPNB813, in which the application was granted with a strictly limited waiver because it was for new construction.<sup>24</sup> Cebridge also contrasts its situation with that of Pacific Microwave Joint Venture,<sup>25</sup> which was denied similar relief, because, Cebridge contends, the application in question involved a virtually unsupported waiver request for ten stations over a large area, including some located in or near significant cities where frequency congestion might be anticipated.<sup>26</sup>

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The licenses for KLS33, KLS34, and KLU53 expire on February 1, 2011.

<sup>22</sup> Letter from Robert L. James, Esq. to Barrett Brick, Esq. and Sandra Danner, Esq. (dated Feb. 23, 2006) (Cebridge Supplemental Letter).

<sup>23</sup> *Id.* at 1-2.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> See Pacific Microwave Joint Venture, *Order*, 15 FCC Rcd 11704 (WTB 2000).

<sup>26</sup> Cebridge Supplemental Letter at 2.

Finally, Cebridge requests that if the Commission declines to grant a permanent waiver as requested, that the Commission grant a temporary waiver for 180 days from the date of closing of the Transaction,<sup>27</sup> to enable the parties to close the Transaction on schedule and to allow Cebridge to take such steps as are necessary to comply with the rule.<sup>28</sup>

### III. DISCUSSION

6. Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is shown that either: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>29</sup> In this case, we conclude that Cebridge has not justified a permanent waiver of the rule.

7. Based upon the facts, and analyzing the existing precedent, we do not find that a permanent waiver of the 50/50 affiliation rule is warranted. A permanent waiver would be inconsistent with the underlying purpose of the 50/50 affiliation requirement. The Commission adopted the 50/50 affiliation requirement in order to ensure that common carrier microwave frequencies are used to provide service to the public, as opposed to customers that are related to the applicant.<sup>30</sup> In creating Part 101 of the Commission's Rules in 2000, the Commission retained the 50/50 affiliation requirement and specifically clarified that it applied to those common carrier microwave stations that are used primarily to relay broadcast television signals, though not to common carrier microwave stations carrying other permissible traffic.<sup>31</sup> Cebridge contends that a waiver will not compromise the underlying purpose of the 50/50 affiliation requirement because the stations at issue provide video programming to cable television systems in a thinly populated area, which presumably would not be of interest to a common carrier not affiliated with Cebridge's customers.<sup>32</sup> This argument is based on unsupported speculation that there are no other licensees that would be interested in that spectrum in that area. A search of the Commission's records indicates that there are 110 active common carrier point-to-point microwave licenses within 50 miles of the transmitter site for Station KLS33.

8. Cebridge has also failed to justify a waiver under the second prong of the waiver standard. The rural nature of the region, standing alone, does not constitute unique or unusual circumstances.<sup>33</sup> Cebridge has also failed to demonstrate that it has no reasonable alternative to obtaining a waiver of the 50/50 affiliation rule. Cebridge does not state that it would be impossible to maintain the system without a waiver. Indeed, Cebridge states that denial of a waiver would result in either a loss of services or substantially higher costs that would ultimately be passed through to Cebridge's subscribers.<sup>34</sup>

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<sup>27</sup> Cebridge has informed Commission staff in a telephone conference call that the parties anticipate closing on April 1, 2006.

<sup>28</sup> Waiver Request at 2.

<sup>29</sup> 47 C.F.R. § 1.925(b)(3).

<sup>30</sup> *First R&O* at 901. See also *Pacific Microwave Joint Venture, Order*, 15 FCC Rcd 11704, 11705 (WTB 2000).

<sup>31</sup> *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 94-148, CC Docket No. 93-2, RM-7861, WT Docket No. 00-19, and RM-9418, 15 FCC Rcd 3129, 3141 (2000).

<sup>32</sup> Waiver Request at 2; Cebridge Supplemental Letter at 2.

<sup>33</sup> See *Pacific Microwave Joint Venture* at 11706.

<sup>34</sup> Waiver Request at 2.

Absent a showing that increased costs would make service impossible, the cost of complying with the Commission's Rules does not justify a waiver.<sup>35</sup>

9. Since the establishment of Part 101 of the Commission's Rules, the Wireless Telecommunications Bureau (WTB) has twice addressed requests for waiver of the 50/50 affiliation requirement. In *Universal Cable Communications, Inc.*,<sup>36</sup> with respect to Universal's application for a new point-to-point microwave station to serve a community in rural Oklahoma, WTB dismissed as moot a request for extension of a temporary, eight month waiver of the 50/50 affiliation requirement, finding that the licensee had failed to come into compliance with the requirement within the eight month period as required and had filed the request for extension beyond the expiration of the eight month period. Four months later, in *Pacific Microwave Joint Venture*, with respect to applications for assignment of ten point-to-point common carrier microwave licenses in southern Oregon and northern California, WTB denied an applicant's permanent waiver request outright, finding that the applicant had failed to demonstrate unique or unusual circumstances or that there was no reasonable alternative to waiver, nor that application of the rule would be inequitable or unduly burdensome.<sup>37</sup> While Cebridge also cites to case files of unreported cases from 1997 and earlier,<sup>38</sup> unpublished decisions have no precedential value for unrelated parties.<sup>39</sup>

10. For similar reasons, we do not find that a temporary waiver for the remaining approximately five years of the license period for the stations in question is warranted. However, recognizing the burden upon Cebridge and all parties involved in this transaction were we to require immediate compliance, we shall grant Cebridge a waiver of the 50/50 affiliation rule for a period of 180 days from the date of closing of the Transaction. Cebridge may not operate the stations in question beyond this date if it is not in compliance with the 50/50 affiliation rule.

#### IV. CONCLUSION AND ORDERING CLAUSES

11. Accordingly IT IS ORDERED that pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 101.81 of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.81, the petition for waiver filed by Cebridge Acquisition, L.P. on December 19, 2005 IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

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<sup>35</sup> See Mississippi Authority for Educational Television, *Memorandum Opinion and Order*, 14 FCC Rcd 7172, 7175 (WTB PSPWD 1999).

<sup>36</sup> *Universal Cable Communications, Inc., Order*, 15 FCC Rcd 18614 (WTB 2000).

<sup>37</sup> *Pacific Microwave Joint Venture* at 11706.

<sup>38</sup> See n. 12, *supra*.

<sup>39</sup> *Kidd Communications, et al., Memorandum Opinion and Order*, 19 FCC Rcd 13584, 13588 n.30 (2004); 47 C.F.R. § 0.445(e).

12. IT IS FURTHER ORDERED that the licensing staff of the Broadband Division SHALL PROCESS Cebridge's pending application, File No. 0002415753, in accordance with this *Memorandum Opinion and Order* and the applicable Commission Rules.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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